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IN THE

Supreme Court
of the United States

OCTOBER TERM, 1946

No. 944

HERMAN BLOCH, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT OF PETITION

✓
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of the United States

OCTOBER TERM, 1946

HERMAN BLOCH, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND
 ASSOCIATE JUSTICES OF THE
 SUPREME COURT OF THE UNITED STATES:

Your Petitioner, HERMAN BLOCH, respectfully shows as grounds for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit:

A

SUMMARY STATEMENT OF THE
 MATTERS INVOLVED

Petitioner had a warehouse in El Paso, Texas, in which he stored tires which were for sale. He employed a watchman, BENJAMIN GOLDBERG, who had been

working for Petitioner for a month prior to the events involved in the Information. In petitioner's absence the watchman made two sales of tires to Inspectors of the Office of Price Administration. Petitioner and his watchman were charged by the Information filed in the District Court of the United States for the Western District of Texas, at the April, 1946, term, in four counts, charging first, the sale of a used tire at a price in excess of the maximum price permitted to be charged under the Revised Price Regulation No. 528; second, the sale of a second used tire for a price in excess of the maximum price permitted to be charged under said Regulation; third, failure to have posted and maintained at his place of business, a notice and list of maximum prices allowed to be charged under the provisions of said Regulation; and, fourth, with failure to issue and deliver a receipt with respect to the sale of the tire mentioned in the first count containing the information required by Section 9 of said Regulation.

The District Court overruled Petitioner's motion for an acquittal at the close of the Government's case, and also at the close of the evidence.

Petitioner was convicted by the jury on each count and sentenced on all counts to a fine of \$1,000.00, with commitment, and to serve eleven months in an institution to be designated by the Attorney General.

On appeal to the United States Circuit Court of Appeals for the Fifth Circuit, that Court affirmed the judgment of the trial Court holding that the Trial Court's charge was not vulnerable to the objections urged against it. The judgment of the United States Circuit Court of Appeals was rendered on November 27, 1946, and thereafter on December 26, 1946, Petitioner's petition for a rehearing was denied.

It is the contention of the Petitioner that the charge of the Trial Court to the jury did not define or otherwise instruct the Jury as to what a used tire is within the meaning of the Regulation, and did not explain what constituted a substantial compliance with the requirements of the Regulation with respect to posting a price list and issuing a receipt or invoice for the sale of a used tire. The charge and the provisions of the regulation are attached.

The controlling question before this Court is whether or not the charge of the Trial Court sufficiently defined the offenses and the elements thereof to enable the jury to determine whether under the facts a violation of same had been committed by the Petitioner.

JURISDICTION

Petitioner relies on Section 240, as amended, Judicial Code, Title 28, U. S. C. A., Section 347, and Rule 11 of the Rules of Practice as promulgated by the United States Supreme Court governing criminal procedure after conviction.

QUESTIONS PRESENTED

The propositions here involved are as follows:

1. In a case involving an alleged violation of a Regulation issued by the Administrator of the Office of Price Administration under the provisions of the Emergency Price Control Act, is it sufficient that the Trial Court charge the jury simply in the language of the Information and by referring to the Regulation only by number and section without stating either the text or substance of the Regulation?

2. In such a case where the Regulation specifically defines what constitutes a used tire as being one used

one thousand miles, or more, may a conviction be sustained where the evidence is silent as to the number of miles the tire had been used, and the jury is not instructed as to what constitutes a used tire under the provisions of the Regulation alleged to have been violated?

B.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Your petitioner contends that a Writ of Certiorari should be allowed and that the decision of the United States Circuit Court of Appeals should be reversed by this Court for these reasons:

I.

The decision of the Circuit Court of Appeals in this case conflicts with and is contrary to the decision of the Circuit Court of Appeals for the Ninth Circuit in *Morris vs. U. S.* 156 Fed. (2) 525, and the decision of the Circuit Court of Appeals for the Third Circuit in *U. S. vs. Levy* 153 Fed. (2) 995. A substantial part of the Trial Court's charge to the jury in the *Morris* case is quoted in the opinion. The charge of the Trial Court in the present case is of the same tenor as the charge in the *Morris* case, the only difference being the Commodity and the Regulation involved. In neither case was the jury given an explanation or definition or enacted text of the offense charged, but instead was told that if they found certain enumerated facts, the verdict must be one of guilty; otherwise it must be one of not guilty.

II.

The alleged violation of law in this case involved a

“used tire” as defined by Price Regulation No. 528. In that Regulation there is an explicit definition of a “used tire”. In the trial of this case there was no testimony expert or otherwise that the tire in question was a used tire within the meaning of the Regulation, and the jury was not charged upon the law as to what constituted a used tire. Under these circumstances Petitioner submits that a conviction may not stand.

In the trial of this case the Judge reserved the law unto himself and the jury passed upon the evidence without having been informed by the Court the exact law which they were to determine had been, or had not been, violated by the Petitioner. This was a departure from the accepted and classical practice of Judicial proceedings and calls for an exercise of this Court’s power of supervision.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify to and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case of HERMAN BLOCH, Appellant, vs. The United States of America, Appellee, No. 11,654, and that said judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

HERMAN BLOCH, Petitioner

By *Herman A. J. [Signature]*
Counsel for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. _____

HERMAN BLOCH, *Petitioner*
versus
UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

1. THE OPINION OF THE COURT BELOW:

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was handed down on November 27, 1946. The petition for re-hearing was denied on December 26, 1946, without opinion. The opinion is attached hereto.

2. JURISDICTION.

A.

The statutory provision believed to sustain jurisdiction in this case is Section 240, of the Judicial Code, 28 U. S. C. A., Section 347.

B.

The judgment sought to be reversed was rendered on November 27, 1946. A petition for rehearing was duly filed and was denied on December 26, 1946. The Court of Appeals on January 4, 1947, entered an order staying the mandate herein for 30 days after December 26, 1946, in order to afford Petitioner an opportunity to make application to this Honorable Court for a Writ of

Certiorari, and further provided therein that said mandate be stayed for such additional time as may be necessary to a final disposition of this cause.

C.

The nature of the case, and the rulings relied upon as a basis for this Court's jurisdiction are shown in the petition for a Writ of Certiorari herein before set forth and hereafter shown in this brief.

3. STATEMENT OF THE CASE.

Reference is here made to the Summary Statement contained in our petition which is made a part of this brief.

4. ASSIGNMENT OF ERRORS.

The assignment of errors intended to be urged are:

FIRST: The Trial Court, and the Circuit Court of Appeals, erred in holding there was sufficient evidence to sustain a conviction.

SECOND: The Trial Court erred in permitting the jury to determine the guilt of an offense on the assumption that the jury knew the essential elements of the crime without being charged thereon by the Court; and the Circuit Court of Appeals erred in holding that the charge complained of was not vulnerable to the objections urged against it.

5. ARGUMENT.

The principles of law involved herein are fundamental, of importance to the general public and especially to

those who are accused of crime and brought to trial in a Court of law.

The charge of the Trial Court and the pertinent sections of the Revised Maximum Price Regulation No. 528 are appended. The attached sections of the Regulation are those which Petitioner contended should have been given the jury in the charge either in text or in substance, but which were not given the jury either in text or in substance. It was essential in this case that the evidence show, and under a proper charge the jury find, that used tires had been sold; that a price list for used tires had not been posted at Petitioner's place of business, and that a receipt or invoice for the sale of a used tire containing the necessary data had not been delivered to the purchaser of the tire. A "used tire" is defined by law in Section 17 of the Regulation; the "posting" requirements are determined by law in Section 8 of the Regulation, and the requirements for the giving of a receipt and the information to be contained therein are determined by law in Section 9 (2) of the Regulation.

There was no evidence adduced that the tires involved were "used tires" within the meaning and definition prescribed by Section 17 of the Regulation other than the statements in the Information. The jury had no knowledge of such requirements of the law.

In a criminal case it is always the duty of the Court to instruct the jury on all essential questions of law whether requested or not. *Screws vs. U. S.* 325 U. S. 91,107; *Kreiner vs. U. S.* 11 Fed. (2) 722, Certiorari denied, 271 U. S. 688.

It is the classical practice that the Court define and explain the offense charged, and that the jury having this information, determine whether such law has been, or has not been, violated by the accused on the basis of the evidence adduced. *Sparf vs. U. S.* 156 U. S. 51.

Where the statute or law is sufficiently clear, the Judge may set forth the statute in his instruction and thereby inform the jury as to the law; but if the statute or laws be not so clear, he must further explain it to the laymen acting as jurors. The charge to the jury should not leave them in ignorance of, or leave them to their conjecture as to what constitutes the offense charged. *Morris vs. U. S.* 156 Fed. (2) 525. The jury should not be reduced to the position of a mere ministerial agent. The jury is bound to take the law from the Court. That is fundamental, hence, a charge that fails to give the law but simply instructs a verdict upon proof of certain facts is fundamentally erroneous.

The method used in the trial of this case loses its surface merit on full consideration of the principles underlying the Judge and jury system, and the task, duty and obligation of each in the administration of justice.

Petitioner therefore believes that the decision of the Circuit Court of Appeals considered in the light of the record in this case is in such conflict with the applicable decisions of the Supreme Court of the United States and the United States Circuit Court of Appeals, and the questions involved, and the rights thereby jeopardized are of sufficient importance to call for a hearing in this Court and the exercise of revisory powers of this Court to the end that an injustice involving the fundamental rights and liberties of a citizen may be corrected.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX " A "

OPINION OF THE UNITED STATES CIRCUIT
COURT OF APPEALS
IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 11,654

HERMAN BLOCH, *Appellant*
versus
UNITED STATES OF AMERICA, *Appellee*

Appeal from the District Court of the United States
for the Western District of Texas

(November 27, 1946)

BEFORE HUTCHESON, HOLMES and McCORD,
Circuit Judges

PER CURIAM: Charging Appellant and another with violations of the Emergency Price Control Act and Regulations, the indictment was in four counts. Counts one and two each charged a sale of tires above ceiling, count three charged failure to post ceiling price, count four charged sale without issuing the required receipt. Convicted on all four counts and given a sentence which was less than could have been imposed on any one of them, appellant is here seeking a reversal on these grounds: (1) the insufficiency of the evidence; (2) the

failure of the Court to properly charge the law to the jury; and (3) the refusal of special charges he asked.

We find no merit in any of the grounds. The evidence, consisting of the testimony of government agents who made the purchases and of a co-defendant, Goldberg, who was in charge for appellant of the place of business, was brief and to one effect. This was that in appellant's place of business where no maximum prices were posted, Goldberg, as his representative, had sold tires above ceiling prices. Appellant did not testify, nor did Goldberg, that appellant had been entrapped. Assuming without deciding, that failure of the trial judge to charge the law fully is fundamental error and that, though appellant did not except to the failure, he may assign it here as error, it is quite clear that the charge complained of here is not vulnerable to the objections urged against it.

Of the failure to give the charges appellant requested, it is sufficient to say of that on entrapment that the issue was not raised, and of the others, that so far as they were correct, their substance was given in the main charge.

No reversible error appearing, the judgment is **AFFIRMED.**

A P P E N D I X " B "

SECTION 17 OF THE REVISED MAXIMUM PRICE REGULATION 528, AS AMENDED.

Section 17: Maximum prices for used tires and tubes and basic tire carcasses. (a) For the purpose of this section, tires are of two kinds: (1) used tires and (2) Basic tire carcasses.

(1) Used tires. A used tire is a tire that has been used 1000 miles or more, or, if it is a recapped tire, has

been used 1000 miles or more after the latest recapping. A tire with lug or cleat types of tread is a used tire if the tread retains sufficient tread design to produce the traction required for the use for which the tire is to be employed. A tire having a tread design other than a lug or cleat type is a used tire if the tread design is not worn smooth for four or more consecutive inches in any direction. For the purpose of this regulation, used tires are classified as (1) Sound used tires; (2) Repairable used tires; (3) Limited service used tires; and (4) Tires not usable on the wheel of a vehicle.

APPENDIX " C "

SECTION 8 OF THE REVISED MAXIMUM PRICE REGULATION 528 AS AMENDED:

Section 8: POSTING OF PRICES: (a) Every person engaged in the business of selling at retail any commodity or service covered by this regulation, shall keep posted at each place of business, in a manner plainly visible to the purchasing public, the following, clearly identified as such:

(1) A list of the maximum retail prices for the tires and tubes sold by him.

(2) A list of the maximum retail prices for his recapping services, and the additional charges that may be made for a tire carcass furnished by the seller.

(3) A list of the maximum retail prices for his tire and tube repair services.

(4) A list of the maximum prices which this regulation permits him to charge for extra services.

(5) A list of the maximum retail prices for reliners, patches and boots (made from scrap materials) sold by

him and of the separate charges, if any, for the services of inserting such reliner, patch, or boot in the tire casing.

(b) Such lists shall set forth the dollars and cents maximum prices as fixed by this regulation. Use of lists having prices in excess of the dollars and cents maximum prices fixed by this regulation, accompanied by discounts or other deductions to arrive at the legal maximum prices may not be used, and are an evasion of this section."

APPENDIX " D "

SECTION 9 (2) REVISED MAXIMUM PRICE REGULATION AS AMENDED:

SECTION 9 (2): Used tires and tubes and basis tire carcasses. Every seller of used tires or tubes or basic tire carcasses shall give every buyer a sales slip listing: (1) the type, size and ply of tire, or the type and size of tube; (2) in the case of a used tire, whether it is sound, repairable, repaired limited service, unrepaired limited service, or not usable on the wheel of a vehicle; (3) in the case of a basic tire carcass, whether it is sound, repairable, or not usable on the wheel of a vehicle; (4) in the case of a tube, whether it is sound, repairable, or not usable in a tire; and (5) the price.

APPENDIX " E "

CHARGE OF THE COURT

Gentlemen of the Jury:

The Court will now give you in charge, orally, as is the practice in United States Courts, the law as applicable to the issues of fact submitted you for determination in this case. In view of the fact the Court's charge is given orally the Court asks each juror to give careful

consideration to each phrase and word used in the Court's charge herein, so when you retire to the jury room to consider of your verdict, as you will in a few moments, you will carry with you a clear recollection of the Court's charge as to the law as applicable to the facts submitted you for determination in this case. That is the purpose of that practice being pursued in the United States Courts.

The defendants, Herman Bloch and Benjamin Goldberg, stand charged in three counts of an information with offenses and acts committed in violation of the law, as charged therein; and in the third count the same relates alone to the defendant Herman Bloch.

It being charged in the information substantially as follows: That on or about November 2, 1945, Herman Bloch and Benjamin Goldberg, at 906 South Santa Fe Street, in the City of El Paso, El Paso County, Texas, in the Western District of Texas and within the El Paso Division thereof, in violation of the Emergency Price Control Act of 1942, as amended, and of the provisions of Section 17 (a) (1) (ii), of Revised Maximum Price Regulation No. 528, as amended, issued pursuant to the provisions of such Act, did unlawfully, knowingly, and wilfully sell and deliver to D. B. Murray a used Marathon Brand passenger automobile tire, size 600x12, 4-ply, bearing serial number as set forth in the information, which you will have before you, and did unlawfully, knowingly, and wilfully charge, collect, and receive therefor from said D. B. Murray the sum of \$10.00 which was in excess of the maximum price permitted to be charged, collected, and received therefor under the provisions of said Section of Revised Maximum Price Regulation No. 528, as amended.

And in the second count of the information, on or

about November 6, 1945, at about 9:15 o'clock A. M., at 906 South Santa Fe Street, in the City of El Paso, El Paso County, Texas, in said District and Division, aforesaid, Herman Bloch and Benjamin Goldberg in violation of the Emergency Price Control Act of 1942, as amended, and of the provisions of Section 17(a) (1) (ii) of Revised Maximum Price Regulation No. 528, as amended, issued pursuant to the provisions of such Act, did unlawfully, knowingly, and wilfully sell and deliver to Charles A. Seymour, a used Mohawk Warrior Brand passenger automobile tire, size 600 x 16, 4-ply, bearing serial number as set forth in the second count of the information, did unlawfully, knowingly, and wilfully charge, collect, and receive therefor the sum of \$10.00, which price was in excess of the maximum price permitted to be charged, collected, and received therefor under the provisions of said section of said Revised Maximum Price Regulation No. 528, as amended.

And in the third count, which relates alone to the defendant Herman Bloch, it is charged substantially as follows: On or about November 6, 1945, at 906 South Santa Fe Street, in the City of El Paso, El Paso County, Texas, in said District and Division, Herman Bloch, in violation of the Emergency Price Control Act of 1942, as amended, and of the provisions of Section 8 of the Revised Maximum Price Regulation No. 528, as amended, issued pursuant to the provisions of said Act, was engaged in the business of acquiring and re-selling, as retail dealer to consumers, used passenger automobile tires at 906 South Santa Fe Street, in the City of El Paso, El Paso County, Texas, in said District and Division, which were subject to the provisions of said regulation and did in violation of said Section, unlawfully, knowingly, and wilfully fail and neglect to have posted and maintained at and in his said place of business, as required by said

regulation, a notice and list of the maximum prices allowed to be charged and collected for used tires, repairable carcasses and scrap rubber in the course of said business and under the provisions of said regulation.

And in the fourth count, that on or about November 2, 1945, at 906 South Santa Fe Street, in the City of El Paso, El Paso County, Texas, in said District and Division, and within the jurisdiction of this Court, Herman Bloch and Benjamin Goldberg in violation of the Emergency Price Control Act of 1942, as amended, and provisions thereof, as set forth in said count of the information, did unlawfully, knowingly, and wilfully sell and deliver to D. B. Murray a used Marathon Brand passenger automobile tire, size 600 x 16, 4-ply, bearing serial number as set forth, did unlawfully, knowingly, and wilfully neglect, fail and refuse to issue and deliver to said D. B. Murray in response to a request therefor by said Murray, a receipt, invoice, or sales slip showing with respect to said sale of said tire the data and information required by said Section of said regulation.

Upon the information being read and the defendants arraigned at the opening of the trial of this case each of the defendants entered a plea of not guilty to the specific charges preferred against them in the respective counts of the information filed herein; and just referred to in the Court's charge to you.

You are charged, gentlemen, as a matter of law, that under and by virtue of the Emergency Price Control Act, and Act of the Congress of the United States, of 1942, as amended, and the regulations issued thereunder, it was made unlawful for any person to knowingly and wilfully sell and deliver a used passenger automobile tire and in making sale of the same to charge and receive therefor the sum of \$10.00, the same being in excess

of the maximum price as prescribed and set forth by the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as charged in the first count of the information herein.

And further, it was unlawful for any person to sell and deliver to another a used passenger automobile tire of the dimensions as charged in the second count of the information, and to receive therefor the sum of \$10.00, which price was in excess of the maximum price permitted to be charged and collected as set forth in the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as charged in the second count of the information.

And further, that it was unlawful for any person who was engaged in selling used passenger automobile tires, and a violation of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, to fail and neglect, wilfully fail and neglect to post and maintain at his place of business, as required by said regulations, notice and list of the maximum prices allowed to be charged and collected for used tires, reparable carcasses, and scrap rubber, in the course of said business and under said regulations, as charged as having been committed by the defendant Herman Bloch, as set forth in the third count of the information herein.

You are further charged it is a violation of the Emergency Price Control Act of the United States of 1942, as amended, and regulations thereunder, in force on and before November 2, 1945; Emergency Price Control Act of 1942, as emended, and regulations issued thereunder, for one dealing in used automobile tires to sell, wilfully and knowingly sell and deliver such used automobile tire and fail and refuse to issue and deliver in connection with such sale, to the purchaser of such tire, in response

to a request, a receipt, invoice or sales slip showing in respect to said sale of such tire data and information required by said section of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder.

Now, gentlemen, as to the question of intent, that is a matter for the jurors to determine from the evidence offered on trial of the cause, presented from the witness stand and heard by you; and the law presumes every man intends the natural and ordinary consequences of his acts. Wrongful acts knowingly and intentionally done cannot be justified on the ground of innocent intent.

As to the meaning of the word "wilful", wilful act is defined to be where a jury believes beyond a reasonable doubt that one knowingly committed the act which constitutes a violation of the law, as charged in the previous portions of the Court's charge herein, and not in observance of such laws and regulations.

Gentlemen of the jury, the testimony in this case is not very voluminous, and you will recall the same according to your recollection thereof, as given from the witness stand by the respective witnesses testifying in this case—the Government witnesses on the one hand, and the defendant Benjamin Goldberg took the stand in his own behalf, on trial of the cause—and arriving at your own deductions and conclusions therefrom, and not be controlled by any statement by the Court with reference to the evidence or the effect that shall be given by you to the same, as that is exclusively the province of the jurors.

The Court will give you in charge, by reason of the nature of the evidence in this case, the law of the United States defining who are principals, as set forth in section 332 of the Penal Code of the United States, which provides, in part, as follows: That whoever directly commits

any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands or procures its commission is a principal. Properly construed that means not only the person who performed a particular act on a certain occasion, committed an offense against the laws of the United States, would be guilty of such offense, if the jurors believe it to be shown by legal and competent evidence beyond a reasonable doubt that he committed the same, but that any other person who aids, abets, counsels, commands, induces or procures the commission of such act by the person committing the same, is also guilty of such offense to the same degree as the person who commits such act. It is not necessary that he be present at the commission of the criminal act.

Therefore, gentlemen of the jury, bearing in mind the Court's charge hereinbefore given you as to the law, as to the question of intent, wilful acts, and the law of principals as defined in the laws and statutes of the United States, if you find and believe it is shown by legal and competent evidence beyond a reasonable doubt that the defendants Herman Bloch and Benjamin Goldberg,—and you will make a separate finding as to each of said defendants under the respective counts of the information herein,—as to the first count, if they did on or about November 2, 1945, in El Paso County, Texas, unlawfully, knowingly, and wilfully sell and deliver to D. B. Murray a used Marathon Brand passenger automobile tire, size 600 x 16, 4-ply, bearing serial number as set forth in said count of the information, and did unlawfully, knowingly, and wilfully charge, collect and receive therefor from said D. B. Murray the sum of \$10.00, which was in excess of the ceiling price as to used automobile tires. And you will recall the testimony of the witness upon the question of excess of the ceiling price as to used automobile tires was \$6.65 in good condition, and if not in such condition

at a less price, as testified to by the witness Strickland on the trial of the case. You would then in that event return a verdict of guilty as against the defendant Herman Bloch and Benjamin Goldberg, either or both, as you may find, making a separate finding as to each, on the first count of the information herein.

And further, if you find and believe it is shown by legal and competent evidence beyond a reasonable doubt that on or about November 6, 1945, in the City of El Paso, El Paso County, Texas, Herman Bloch and Benjamin Goldberg, did violate the Emergency Price Control Act in that they did unlawfully, knowingly, and wilfully sell and deliver to Charles A. Seymour a used Mohawk Warrior Brand passenger automobile tire, size 600 x 16, 4-ply, bearing serial number as charged in the second count of the information, and did unlawfully, knowingly, and wilfully charge, collect and receive the sum of \$10.00, which price was in excess of the maximum price permitted to be charged, collected and received under the provisions of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder; you would return a verdict of guilty as to such defendant or defendants, making a separate finding as to each defendant of the offense charged in the second count of the information.

Further, if you should find and believe it is shown by legal and competent evidence beyond a reasonable doubt that on or about November 6, 1945, at 906 South Santa Fe Street in the City of El Paso, El Paso County, Texas, the defendant Herman Bloch, in violation of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as set forth in said third count of the information, unlawfully, knowingly, and wilfully fail and neglect to have posted and maintained at and in his place of business, as required by such regulations and such law,

notice and list of the maximum prices allowed to be charged and collected for used tires, reparable carcasses and scrap rubber; you would then return a verdict of guilt as to the defendant Herman Bloch of the offense charged in the third count of the information herein.

And further, if you should find and believe it is shown by legal and competent evidence beyond a reasonable doubt that the defendants, Herman Bloch and Benjamin Goldberg,—making a separate finding as to each defendant,—did on or about November 2, 1945, at 906 South Santa Fe Street in the City of El Paso, Texas, in violation of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, unlawfully, knowingly, and wilfully sell and deliver to D. B. Murray a used Marathon Brand passenger automobile tire, size 600 x 16, 4-ply, bearing serial number as in said count of the information set forth, did unlawfully, knowingly, and wilfully neglect, fail, and refuse to deliver to D. B. Murray, a receipt, invoice or sales slip showing with respect to the sale of said tire the data and information as required by said section of the regulations; you would then return a verdict of guilty as to such defendant or defendants, as you may find, of the offense charged in the fourth count of the information herein,—making a separate finding as to each of said defendants.

On the other hand, gentlemen of the jury, if you should find that it is not shown by legal and competent evidence beyond a reasonable doubt,—making a separate finding under each one of the four counts of the information herein, or those counts that refer to the respective defendants herein,—that they did commit the offenses as therein charged in said respective counts of the information herein; you would then in that event return a verdict of not guilty as to such defendant or defendants, as you may find, under each of the respective counts of the

information herein and charges therein preferred against them.

The defendants in this case, as in all criminal cases, are presumed to be innocent of the offenses with which they are charged until their guilt shall be established by legal and competent evidence beyond a reasonable doubt, the burden of making such proof being upon the Government, and the defendants in this case are entitled, and each of them, to such presumption. But you are also instructed by the Court by the term "reasonable doubt" is not meant a mere fanciful conjecture such as an imaginative person or mind might conjure up, but is a doubt which reasonably arises from evidence or want of evidence, such a doubt as a reasonable prudent person would act upon or decline to act upon in affairs of highest concern to himself.

The defendant Benjamin Goldberg took the stand and testified as a witness on trial of this case, and you are instructed by the Court you will give to his testimony the same consideration you would give to that of other witnesses; however, bearing in mind and taking into consideration the motive that may have prompted him to testify in the manner he has testified in the trial of the cause, in your arriving at a determination as to the truthfulness or falsity of his testimony and the weight that should be given by you to same. And in this connection you will take into consideration the motive that prompted all witnesses to testify as they have testified, in arriving at a determination of the truthfulness or falsity of their testimony and the weight that shall be given by you to same.

On trial of this case you may find, as you recall the testimony, there has arisen some conflict in the testimony between the Government witnesses on the one hand and the defendants' witness Goldberg on the other hand.

Where there arises a conflict in the testimony it is the duty of the jurors if they can to reconcile such conflict, but if after careful consideration of the testimony you are unable to reconcile the conflict it is the duty of the jurors to determine what witness' or witnesses' testimony you will give the greatest of weight.

The Court will say that jurors in the United States Courts are not called upon or privileged to pass upon the question of punishment in the case in the event the verdict should be that of guilty; but that is a matter that under the statutes and laws of the United States of America is a duty that is vested in and devolves upon the Judge of the Court.

You, gentlemen of the jury, are the exclusive judges of the credibility of the witnesses, all the witnesses, and the weight to be given their testimony and the facts proven in the case. As to the law, you will receive the same and be controlled thereby as given you in charge by the Court herein.

The Clerk will deliver to you a draft into which you will write your verdict in this case, which draft will be substantially in the following form: "We, the jury, find the defendant Herman Bloch," and a blank space is there left into which you will write your verdict of guilty or not guilty as you may find, "as charged in the first count of the information." And a blank space into which your verdict will be written of guilty or not guilty as charged in the second count, and in the third and in the fourth counts of information. "We further find the defendant Benjamin Goldberg", and a blank space is there left into which you will write your verdict of guilty or not guilty, "as charged in the first count," and guilty or not guilty as charged in the second count, and your verdict of guilty or not guilty as charged in the fourth count thereof.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 944

HERMAN BLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 68-69) is reported at 158 F.2d 519.

JURISDICTION

The judgment of the circuit court of appeals was entered November 27, 1946 (R. 70), and a petition for rehearing (R. 71-73) was denied December 26, 1946 (R. 74). The petition for a writ of certiorari was filed January 24, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

The principal question presented is whether the trial judge's charge to the jury adequately explained the elements of the offenses charged as defined in the maximum price regulation.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 and of Revised Maximum Price Regulation No. 528 are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

On April 9, 1946, an information in four counts was filed in the District Court for the Western District of Texas, charging petitioner with having willfully made sales of used tires at prices in excess of the ceiling prices (counts 1 and 2), willful failure to post ceiling prices (count 3), and willful refusal to deliver a receipt to a purchaser of a used tire (count 4) (R. 1-4). The respective counts of the information cited the particular provisions of Revised Maximum Price Regulation No. 528 alleged to have been violated. Petitioner's employee, Benjamin Goldberg, was charged and tried as a codefendant on counts 1, 2 and 3.

After a jury trial, petitioner was found guilty on all counts (R. 8, 64), and he was sentenced generally to pay a fine of \$1,000 and to imprisonment for eleven months (R. 12, 64).¹ On appeal to the Circuit Court of Appeals for the Fifth Circuit, the conviction was affirmed (R. 70).

The evidence in support of the Government's case may be summarized as follows:

Petitioner owned and operated a warehouse in El Paso, Texas, for the sale of automobile and truck tires (R. 39-40). He employed Goldberg primarily as a watchman, but also to make sales of automobile tires in petitioner's absence (R. 40-41). There were two piles of used tires in the warehouse. Petitioner instructed Goldberg to sell from the pile of better tires at either \$8 or \$10 per tire, depending on their condition, and from the pile of poorer tires at \$3 each (R. 41-44). An O. P. A. investigator and a Liquor Control Board Inspector each testified that he purchased a tire selected from the pile of better tires at a price of \$10, as alleged in counts 1 and 2 (R. 25-26, 28-29; see also R. 41-42). Expert testimony showed that the tire involved in count 1 had a sectional

¹ Petitioner's codefendant Goldberg was found guilty on counts 1 and 2 (R. 8, 64), and sentenced generally to pay a fine of \$50 and to imprisonment for sixty days, but execution of the imprisonment sentence was suspended and Goldberg placed on probation (R. 13, 64). Goldberg did not appeal.

repair but was otherwise sound, and that the tire involved in count 2 was in need of a sectional repair (R. 36-37). The tires were introduced in evidence (R. 27, 29) and exhibited to the jury in the course of the expert testimony (R. 36-37). As shown both by the evidence (R. 32-33, 37) and the applicable O. P. A. Regulation (Table B-1, *infra*, p. 16), the respective price ceilings for these two tires were \$6.65 and \$3.15.

With respect to the violation charged in count 3, the evidence showed that a list of ceiling prices was not posted at petitioner's warehouse and could not be found, and that petitioner had admitted this to an O. P. A. investigator (R. 32).² The charge in count 4 was established by the testimony of the purchaser of the tire involved in count 1 that when he asked Goldberg for a receipt, the latter replied that "he did not give a receipt" (R. 29).³

ARGUMENT

The petition challenges the conviction on the grounds: (1) that the charge to the jury was fatally deficient, in that the court failed to ex-

² Goldberg, testifying for the defense, corroborated the Government's evidence as to the failure to post ceiling prices, but testified that a price list "from some tire company" was kept with the books (R. 50).

³ Goldberg testified that he always gave receipts and denied that he had failed to give one to this purchaser or that he told the purchaser he did not give a receipt (R. 43, 45).

plain and define what constituted a used tire and what constituted "substantial" compliance with the requirements of the regulation with respect to posting a price list and the provisions of the regulation requiring the issuance of a receipt (Pet. 3, 4-5, 7-9); and (2) that there was no evidence that the tires in question were used tires within the meaning of the regulation (Pet. 5, 8). The latter contention, which was first raised on petition for rehearing in the court below (see R. 73), is clearly without substance when considered in the light of the expert testimony (*supra*, pp. 3-4) that due to their condition and unserviceability, the tires, which were also exhibited to the jury, were salable under the regulation only as used tires at prices not to exceed \$3.15 and \$6.65, respectively.

Petitioner's attack upon the trial court's instructions is without merit. The court summarized the allegations of the information and in so doing cited the particular sections of Revised Maximum Price Regulation No. 528 alleged to have been violated (R. 54-56). The court then explained *seriatim* as to each count the elements of the respective offenses in terms of particular acts or conduct which are unlawful under the provisions of the regulation here involved (R. 56-57). The full text of these particular instructions

is set forth in the margin.⁴ At the conclusion of the charge, in response to the court's inquiry whether there were any exceptions, defense counsel "excepted" solely "for the reason that the information does not contain any allegation or sufficient allegation on which to base the charge,"

⁴"You are charged, gentlemen, as a matter of law, that under and by virtue of the Emergency Price Control Act, an Act of the Congress of the United States, of 1942, as amended, and the regulations issued thereunder, it was made unlawful for any person to knowingly and wilfully sell and deliver a used passenger automobile tire and in making sale of the same to charge and receive therefor the sum of \$10.00, the same being in excess of the maximum price as prescribed and set forth by the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as charged in the first count of the information herein.

"And further, it was unlawful for any person to sell and deliver to another a used passenger automobile tire of the dimensions as charged in the second count of the information, and to receive therefor the sum of \$10.00, which price was in excess of the maximum price permitted to be charged and collected as set forth in the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, as charged in the second count of the information.

"And further, that it was unlawful for any person who was engaged in selling used passenger automobile tires, and a violation of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, to fail and neglect, wilfully fail and neglect to post and maintain at his place of business, as required by said regulations, notice and list of the maximum prices allowed to be charged and collected for used tires, reparable carcasses, and scrap rubber, in the course of said business and

but did not take any exception to the instructions quoted in the margin (R. 63).⁵

Petitioner does not (with one irrelevant exception) point out why or in what respects the instructions concerning failure to post ceiling prices (count 3) and failure to give a receipt (count 4) were deficient.⁶ And it is evident from a comparison of the instructions with the applicable

under said regulations, as charged as having been committed by the defendant Herman Bloch, as set forth in the third count of the information herein.

"You are further charged it is a violation of the Emergency Price Control Act of the United States of 1942, as amended, and regulations thereunder, in force on and before November 2, 1945; Emergency Price Control Act of 1942, as amended, and regulations issued thereunder, for one dealing in used automobile tires to sell, wilfully and knowingly sell and deliver such used automobile tire and fail and refuse to issue and deliver in connection with such sale, to the purchaser of such tire, in response to a request, a receipt, invoice or sales slip showing in respect to said sale of such tire data and information required by said section of the Emergency Price Control Act of 1942, as amended, and regulations issued thereunder."

⁵ Rule 30 of the Federal Rules of Criminal Procedure provides:

"* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

⁶ The only deficiency alleged by petitioner with respect to either of these instructions is that the trial court erred in not explaining to the jury what constituted "substantial" compliance with the requirement that a price list be posted (Pet. 3). However, the provision of the regulation requiring post-

provisions of the regulation (sections 8 and 9, *infra*, pp. 14, 15) that the instructions properly and adequately explained to the jury the elements of the offenses proscribed by those provisions. Since the general sentence imposed on petitioner did not exceed that which could have been imposed on any one of the four counts, and since the validity of the convictions on counts 3 and 4 are not challenged on any other ground, it is immaterial on appeal whether the instructions concerning counts 1 and 2 were deficient. *Pinkerton v. United States*, No. 719, O. T. 1945, decided June 10, 1946, slip opinion p. 1, fn. 1.

Moreover, we submit that the instructions explaining the character of the ceiling-price violations charged in counts 1 and 2 were adequate in that they disclosed to the jury all of the elements of such an offense and pointed the way for the jury to arrive at their verdict depending upon

ing (Sec. 8, *infra*, p. 14), in terms requires that a price list be posted at each place of business in a manner plainly visible to the purchasing public. The evidence, both for the Government and the defense, showed that no price list had been posted anywhere at petitioner's place of business, and that there was not even a shadow of compliance with this requirement of the regulation. Thus, since no issue of "substantial" compliance was raised by the testimony, an instruction presenting this as an issue would not have been required, even had it been requested. See *Bird v. United States*, 187 U. S. 118, 132; *Grace v. United States*, 4 F. 2d 658, 661-662 (C. C. A. 5), certiorari denied, 268 U. S. 702; *Meyer v. United States*, 258 Fed. 212, 216 (C. C. A. 7).

their findings as to the facts. Thus, the court told the jury that as a matter of law, it was unlawful wilfully to charge \$10 for a used tire, since that price was in excess of the maximum price fixed in the regulation. Since there was no dispute as to the ceiling prices applicable to the tires involved in counts 1 and 2 or that they were sold for \$10 each, there can be no serious question but that the jury was sufficiently informed as to the applicable law embodied in the regulation.

Petitioner asserts that there is a conflict in this regard between the decision below and the decisions of the Third and Ninth Circuits in *United States v. Levy*, 153 F. 2d 995, and *Morris v. United States*, 156 F. 2d 525, respectively. The defect found in the trial judge's instructions in each of those cases was not, as petitioner implies, that the jury was instructed that if they found certain facts they should convict,⁷ but that the judge did not, in addition, instruct the jury as to the requirements of the statute and applicable regulations. See 153 F. 2d at 998-999; 156 F. 2d at 527, 528, 531. In the instant case, on the other hand, the requirements of the regulation were sufficiently explained to the jury. Indeed, the

⁷ Cf. *Horning v. District of Columbia*, 254 U. S. 135, and *Hewitt v. United States*, 110 F. 2d 1 (C. C. A. 8), certiorari denied, 310 U. S. 641, in which much more strongly worded charges of that kind were upheld.

court's explanation here was at least as detailed and informative as were the instructions approved by the Ninth Circuit in *Wilton v. United States*, 156 F. 2d 433, decided the day after the *Morris* decision was announced, and in which the opinion was written by Circuit Judge Albert Lee Stephens, who had written the opinions in the *Morris* and *Levy* cases.⁸ In the *Wilton* case, the jury was instructed that if it found certain facts, it was to convict, but this statement was prefaced by a brief allusion to the requirements of the regulation, phrased in terms of "the duty" of the defendant. This was held to be sufficient reference to the applicable law to sustain the charge, and the *Levy* case was distinguished on that ground. 156 F. 2d at 436.

Petitioner's further complaint that the jury was not instructed as to the meaning of the term "used tire" (see Sec. 17 of the regulation, *infra*, p. 15), is likewise unavailing, for there was no dispute or conflict of testimony at the trial concerning the meaning of the phrase or its applicability to the tires involved. Cf. *Deacon v. United States*, 124 F. 2d 352, 356-357 (C. C. A. 1), in which a similar contention concerning the definition of the word "lottery" was rejected. See also fn. 5, pp. 7-8 *supra*.

⁸ Judge Stephens was sitting by designation on the Third Circuit at the time the *Levy* case came before that court.

CONCLUSION

The decision below is clearly correct, and there is no real conflict of decisions or important question involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1947.

APPENDIX

The Emergency Price Control Act (56 Stat. 23, 50 U. S. C. App., Supp. V, 901 *et seq.*), provides in pertinent part:

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable

to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Revised Maximum Price Regulation No. 528 (10 F. R. 2726, 10181) provides in pertinent part:

SECTION 1. *What this regulation covers—*

(a) *Transactions covered—*

(1) *New tires and tubes.* This regulation applies to all retail sales of new rubber tires and tubes for automobiles, trucks, busses, trailers, off-the-road equipment, farm-implements, tractors, industrial equipment, motorcycles, and aircraft. A tire or tube other than an aircraft tire or tube is "new" if it has been used less than 1,000 miles. An aircraft tire and tube is "new" if it has never been used. "Retail sale" means a sale to a buyer for his own use and not for resale. This regulation, however, does not apply to wholesale sales; such sales are covered by Revised Maximum Price Regulation 143. Neither does this regulation apply to manufacturers' or brand owners' sales of any new tires and tubes to any agency of the United States Government. New tires which the manufacturer or brand owner has found defective and not repairable, and which such manufacturer or brand owner has slashed or otherwise mutilated prior to his delivery to any person, shall be deemed scrap rubber, and the maximum price thereof shall be determined in accordance with the provisions of Revised Price Schedule 87.

(2) *Used tires and tubes and basic tire carcasses.* This regulation applies to all sales of used rubber tires and tubes and basic tire carcasses. This regulation does

not apply, however, to sales of used tires and tubes and basic tire carcasses when such tire or tube is sold to a splitter or reclaimer for splitting or reclaiming. Such sales are covered by Revised Price Schedule 87. Used tires and tubes and basic tire carcasses are defined in section 17.

* * * * *

SEC. 8. *Posting of prices.* (a) Every person engaged in the business of selling at retail any commodity or service covered by this regulation, shall keep posted at each place of business, in a manner plainly visible to the purchasing public, the following, clearly identified as such:

(1) A list of the maximum retail prices for the tires and tubes sold by him.

(2) A list of the maximum retail prices for his recapping services, and the additional charges that may be made for a tire carcass furnished by the seller.

(3) A list of the maximum retail prices for his tire and tube repair services.

(4) A list of the maximum prices which this regulation permits him to charge for extra services.

(5) A list of the maximum retail prices for reliners, patches, and boots (made from scrap materials) sold by him, and of the separate charges, if any, for the services of inserting such reliner, patch, or boot in the tire casing.

(b) Such lists shall set forth the dollars and cents maximum prices as fixed by this regulation. Use of lists having prices in excess of the dollars and cents maximum prices fixed by this regulation, accompanied by discounts or other deductions to arrive at the legal maximum prices, may not be used, and are an evasion of this section.

SEC. 9. *Sales slips and receipts*—(a) *Sales at retail.* If more than one article is included in one transaction, only one sales slip or receipt is required, provided that it contains the specified information for each article. The name and address of the seller and the date of sale must appear on every sales slip or receipt.

(1) *New tires and tubes.* Every seller of new tires or tubes shall give every buyer a sales slip listing (i) the type, size, ply, and brand name of the new tire or tube; (ii) the price; and (iii) if it is a factory second or factory reject, a statement to that effect.

(2) *Used tires and tubes and basic tire carcasses.* Every seller of used tires or tubes or basic tire carcasses shall give every buyer a sales slip listing: (i) the type, size, and ply of tire, or the type and size of tube; (ii) in the case of a used tire, whether it is sound, repairable, repaired limited service, unrepaired limited service, or not usable on the wheel of a vehicle; (iii) in the case of a basic tire carcass, whether it is sound, repairable, or not usable on the wheel of a vehicle; (iv) in the case of a tube, whether it is sound, repairable, or not usable in a tire; and (v) the price.

* * * * *

SEC. 17. *Maximum prices for used tires and tubes and basic tire carcasses.* (a) For the purpose of this section, tires are of two kinds: (1) Used tires and (2) Basic tire carcasses.

(1) *Used tires.* A used tire is a tire that has been used 1,000 miles or more, or, if it is a recapped tire, has been used 1,000 miles or more after the latest recapping.

* * * * *

**TABLE B-1.—USED PASSENGER CAR TIRES OTHER THAN BASIC
TIRE CARCASSES THAT ARE SOUND OR THAT CAN BE MADE
SOUND**

| Tire size | Maximum prices for sound used tires | Deductions required on unrepaired tires | |
|--------------|--|--|---|
| | | Each spot repair needed | Each sec- tional or reinforce- ment re- pair needed |
| • • | • | • | • |
| 6.00-16..... | 6.65 | 1.50 | 3.50 |
| • • | • | • | • |